Supreme Court, U.S.
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No. ———

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

JAMES I. MUIRHEAD, LUCILLE MUIRHEAD, ROBERT E. MUIRHEAD, GLENDA MUIRHEAD, and JAMES I. MUIRHEAD and ROBERT E. MUIRHEAD D/B/A TIMBERLANE RANCH,

Petitioners,

v.

UNITED STATES OF AMERICA, ACTING ON BEHALF OF THE FARMERS HOME ADMINISTRATION, SEA LANDS, LTD. and CALVIN T. KIRKSEY,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether a deed of trust taken by the Farmers Home Administration in Mississippi survives forever or is extinguished by substantive, non-discriminatory Mississippi law providing that the lien of a deed of trust cannot exist without an enforceable underlying debt.

PARTIES TO THE PROCEEDING

1. James I. Muirhead; Lucille Muirhead; Robert E. Muirhead; Glenda Muirhead; James I. Muirhead and Robert E. Muirhead d/b/a Timberlane Ranch, a Mississippi Geenral Partnership, Defendants/Counterplaintiffs in the trial court, Appellants in the Court of Appeals for the Fifth Circuit and Petitioners here.

2. United States of America Acting on Behalf of The Farmers Home Administration, Plaintiff and Counter-defendant in the United States District Court for Southern District of Mississippi, Appellee in the Court of Appeals for the Fifth Circuit and Respondent here.

3. Sea Lands, Ltd., Third-Party Defendant in the United States District Court for Southern District of Mississippi, Appellee in the Court of Appeals for the Fifth Circuit and a Respondent herein.*

4. Calvin T. Kirksey, Jr., in his capacity as trustee of the deeds of trust in question, Counter-defendant in the United States District Court for Southern District of Mississippi, Appellee in the Court of Appeals for the Fifth Circuit and Respondent here.

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* There is no parent or subsidiary company or companies to Sea Lands, Ltd.

Sea Lands, Ltd. was the purchaser of one of the tracts of land covered in the Farmers Home Administration deeds of trust at the foreclosure sale conducted by Calvin T. Kirksey, an employee of the Farmers Home Administration who served as trustee in the deeds of trust in question.

The Department of Treasury—Internal Revenue Service, Deposit Guaranty National Bank and Staff Leasing of Mississippi, Inc. were parties to the proceeding in the trial court but did not appear or participate in the proceedings before the Court of Appeals for the Fifth Circuit.

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The Petitioners, James I. Muirhead, Lucille Muirhead, Robert E. Muirhead, Glenda Muirhead, and James I. Muirhead and Robert E. Muirhead d/b/a Timberlane Ranch, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on January 25, 1995.

OPINIONS BELOW

The opinion of the Court of Appeals, reported at 42 F.3d 964, appears in the Appendix hereto. The unreported decision of the United States District Court for the

Southern District of Mississippi also appears in the Appendix.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on January 24, 1995. No petition for rehearing or for rehearing *en banc* was filed with the Court of Appeals. This petition for certiorari was filed within ninety (90) days of the date of the entry of the judgment of the Court of Appeals. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Mississippi Code Annotated:

§ 15-1-21. *Actions on mortgages, deeds of trusts, and statutory liens to be brought within time allowed for action upon writing in which debt is specified.*

When a mortgage or deed of trust shall be given on real or personal estate, or when a lien shall be given by law, to secure the payment of a sum of money specified in any writing, an action or suit or other proceedings shall not be brought or had upon such lien, mortgage, or deed of trust to recover the sum of money so secured except within the time that may be allowed for the commencement of an action at law upon the writing in which the sum of money secured by such lien, mortgage, or deed of trust may be specified. In all cases where the remedy at law to recover the debt shall be barred, the remedy in equity on the mortgage shall be barred.

United States Code, Title 28:

§ 2415. Time for commencing actions brought by the United States

(a) Subject to the provisions of section 2416 of this title, and except as otherwise provided by Congress, every action for money damages brought by the United States or an officer or agency thereof

> which is founded upon any contract express or implied in law or fact, shall be barred unless the complaint is filed within six years after the right of action accrues or within one year after final decisions have been rendered in applicable administrative proceedings required by contract or by law, whichever is later: [1]

STATEMENT OF THE CASE

In 1979 and 1980, James I. Muirhead and his wife, Lucille Muirhead, Robert E. Muirhead and his wife, Glenda Muirhead, and James I. Muirhead and Robert E. Muirhead d/b/a Timberlane Ranch, a Mississippi General Partnership, (collectively hereinafter the "Muirheads"), negotiated loans with and executed promissory notes in favor of the Farmers Home Administration (hereinafter "FmHA"). These notes were secured by several deeds of trust on properties located in Copiah, Rankin, Hinds and Simpson counties in Mississippi. The Muirheads are all resident citizens of the State of Mississippi.

In April, 1982, FmHA sent the Muirheads notices of acceleration declaring all of the promissory notes immediately due and payable. A second notice of acceleration and demand for payment was sent to the Muirheads in May, 1985. Thereafter, FmHA did nothing more until October, 1991, approximately nine and one-half (9½) years after the original acceleration of the promissory notes, when it began preparing to initiate foreclosure proceedings with respect to the real property covered by the Muirhead deeds of trust.[2]

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[1] The lengthy remainder of this section is omitted for lack of relevance to this case.

[2] It should be noted that prior to January 10, 1991, 7 C.F.R. Part 1927(b) of the FmHA's regulations provided in pertinent part, that there was a six (6) year limitation on suits to foreclose security interests of the FmHA. On January 10, 1991 the FmHA removed this provision from its regulations.

In October, 1991 FmHA brought this action to reform one of the deeds of trust in the United States District Court for the Southern District of Mississippi. Also, in October, 1991, the FmHA commenced public notice, as required by Mississippi statute, to conduct power of sale foreclosures on its deeds of trust. In response to the reformation suit the Muirheads answered and counterclaimed that under Mississippi law, none of the liens was enforceable because the statute of limitations had run on each of the underlying notes. While the action was pending the FmHA completed its power of sale foreclosures on all of the properties except that covered by the reformation action. FmHA purchased all but one of the properties sold, the other tract being purchased by Sea Lands, Ltd., a Mississippi corporation. As a result, the Muirheads amended their counterclaim and filed a third-party complaint against Sea Lands seeking to set aside the sales.

The district court granted the FmHA's motions to dismiss the counterclaim and for summary judgment. The court concluded that, while FmHA may have been time barred by federal law, 28 U.S.C. § 2415(a) (1988), from bringing an action on the notes, the FmHA was not barred by limitations from bringing a foreclosure action.

On May 6, 1993 the district court entered its Judgment based upon the previous Memorandum Opinion and Order (See Appendix at 10a-22a). On June 21, 1993 the Muirheads filed a timely Notice of Appeal of the Judgment in the district court with the United States Court of Appeals for the Fifth Circuit.

On January 25, 1995 the United States Court of Appeals entered its judgment and opinion finding that § 15-1-21 of the Mississippi Code was a statute of limitations, and that *United States v. Summerlin*, 310 U.S. 414 (1939) required it to hold that the FmHA was not subject to the Mississippi statute which extinguished mort-

gages in the absence of an underlying debt. However, the Fifth Circuit criticized this result concluding:

> In short, *Summerlin* and related cases ought to be reconsidered insofar as they hold that state statutes of limitations may not be applied to the government's real property foreclosure actions arising from federal loan programs. (Appendix at 9a).

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW RAISES SERIOUS AND PERVASIVE PROBLEMS FOR REAL ESTATE TITLES AND COMMERCE IN REAL ESTATE THROUGHOUT THE COUNTRY FROM THE PERPETUAL EXISTENCE OF FEDERAL MORTGAGES.

In the case below the Fifth Circuit held that deeds of trust taken by quasi-commercial federal lenders, such as the FmHA, are not extinguished by the expiration of the statute of limitations on their underlying debts and therefore survive forever. This was the position for which the FmHA argued. Other courts have reached the same result [3]; some have completely disagreed.[4]

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[3] See *United States v. Alvarado*, 5 F.3d 1425 (11th Cir. 1993); *Westnau Land Corp. v. U.S. Small Business Administration*, 1 F.3d 112 (2d Cir. 1993); *United States v. Dos Cabezas Corp.*, 995 F.2d 1486 (9th Cir. 1993); *United States v. Ward*, 985 F.2d 500 (10th Cir. 1993).

It is important to note that in *Alvarado* as in the New York Supreme Court case of *Cracco v. Cox*, 414 N.Y.S.2d 404 (App.Div. 1979), upon which virtually all of the other Circuit Court decisions are based, the Court turned to state law to determine whether a mortgage survived the bar of the underlying debt.

[4] *United States v. Thornburg*, 835 F.Supp. 543 (E.D. Cal. 1993); *Curry v. United States Small Business Administration*, 679 F.Supp. 966 (N.D. Cal. 1987). See also in a related context: *Davidson v. Federal Deposit Insurance Corp.*, 44 F.3d 246 (5th Cir. 1995).

The Fifth Circuit found itself to be bound by this Court's 56 year old decision in *United States v. Summerlin*, 310 U.S. 414 (1939) and decisions in the other Circuits. However, in a substantial departure from the other Circuit Court decisions, the Fifth Circuit harshly criticized the result it felt bound to reach and called for a reexamination of the aged *Summerlin* in the context of federal mortgage extinguishment.

> But although present authority compels acceptance of FmHA's position, we are troubled by the federal government's insistence that it may enforce ancient mortgages outstanding in numerous, long-lived and often default-prone federal lending programs essentially forever. The continued existence of these mortgages may cloud titles to property all over the country, and in so doing will engender confusion, higher real property transaction costs, and commercial instability. If federal agencies simply conformed their lending practices to the dictates of state law, as every private lender must, they would act more promptly upon defaulted mortgages and would not prejudice the alienability of reality [sic].
>
> The government's central proposition—that limitations may not run against the sovereign—seems quite inappropriate in the context of federal loan programs. . . . The Supreme Court understood [in *Kimbell Foods*] that superimposing on state commercial law special federal rules to govern lien priorities arising from federal loan programs would become hopelessly complex and would ultimately have adverse economic effects. (Appendix at 7a-8a)

As noted by the Fifth Circuit in its opinion, many decisions of this Court more recent than the 1939 *Summerlin* decision have refused to upset intricate state law schemes in response to the government's repeated requests for federal common law favoring it. E.g. *United States v. Kimbell Foods, Inc.*, 440 U.S. 715 (1979) and *U.S. v. Yazell*, 382 U.S. 341 (1966). The Circuits have

followed this Court's lead in refusing to upset established state commercial practices in favor of federal protectionism.[5]

The broad reach of *Summerlin* has been significantly modified since 1939. This Court on a number of occasions since *Summerlin* has pointed out the significant distinctions between the federal government acting in its essential sovereign capacity and in its quasi-commercial lender capacity.

For example, in *Yazell*, this Court reminded the federal government that, "The United States, as sovereign has certain preferences and priorities, but neither Congress nor this Court has ever asserted that they are absolute." 382 U.S. at 348-9. The *Yazell* Court held that the rights obtained by government lenders, in programs like the FmHA and the SBA, would be determined by non-discriminatory state law.[6] The Court specifically refused SBA's pleas for federal protectionism.

The *Yazell* Court also stated that typically "federal law" would be applied to supersede state law only where, by the nature of the programs or actions of the federal government, there was a requirement of uniformity throughout the country. Otherwise, the Court pointed

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[5] E.g. *Davidson v. Federal Deposit Insurance Corp., supra; United States v. Currituck Grain, Inc.*, 6 F.3d 200 (4th Cir. 1993); *Regan v. U.S. Small Business Administration*, 926 F.2d 1078 (11th Cir. 1991); *Wabash Valley Power Association, Inc. v. Rural Electrification Administration*, 903 F.2d 445 (7th Cir. 1990); *United States v. Kelley*, 890 F.2d 220 (10th Cir. 1989); *Dupnik v. U.S.*, 848 F.2d 1476 (9th Cir. 1988); *U.S. v. Irby*, 618 F.2d 352 (5th Cir. 1980); *United States v. Dismuke*, 616 F.2d 755 (5th Cir. 1980); *United States v. S.K.A. Associates, Inc.*, 600 F.2d 513 (5th Cir. 1979).

[6] In *Yazell* the SBA failed to satisfy the Texas laws on coverture in taking a deed of trust from Mrs. Yazell and her husband. The Court found that the SBA knew what Texas law was with regard to Mrs. Yazell's capacity when they negotiated the contractual agreements, and thus they were bound by it.

out that it would be solicitous of state interests, particularly in the field of family and family property arrangements, and that these should not be overridden unless "clear and substantial interests of the National Government, which cannot be served consistently with respect for such state interests, will suffer major damage if state law is applied." 382 U.S. at 352.

Yazell's holding requiring a "clear and substantial" governmental interest to override non-discriminatory state law was further amplified in *Kimbell Foods*. There the Court held that programs such as the FmHA and SBA were not nationwide Federal programs requiring uniform national rules, and that the government, when acting as a quasi-commercial lender, does not require the special priority which it compels as sovereign in its tax-collecting capacity. *Id.* at 737-8.

The government had argued, as the FmHA essentially did below, that the Court should carve out special federal law to protect the U.S. Treasury and ease loan administration. *Kimbell* flatly rejected the government's argument, stating:

> We are unpersuaded that, in the circumstances presented here, nationwide standards favoring claims of the United States are necessary to ease program administration or to safeguard the Federal Treasury from defaulting debtors. Because the state commercial codes "furnish convenient solutions in no way inconsistent with adequate protection of the federal interest[s] (Citation omitted), we decline to override intricate state laws of general applicability on which private creditors base their daily commercial transactions.
>
> Incorporating state law to determine the rights of the United States as against private creditors would in no way hinder administration of the SBA and FHA loan programs. *Id.* at 729.

In fact, in *Kimbell Foods* the Court specifically rejected the idea that the FmHA loan program, (which is the same as the one involved in the instant case), needed special uniform national rules. The Court found that the FmHA tailored its programs, forms and regulations to state law, and that "they mandate compliance with state procedures for perfecting and maintaining valid security interests, and highlights those rules which differ from state to state." *Id.* at 731. The Court went on to find that the FmHA's protestations of imminent disruption were not supported.

> Contrary to the Government's claim that the FHA complies only with state procedural rules, . . . the agency's reliance on state law extends to substantive requirements as well. Indeed, applicable regulations suggest that state rules determine the priority of FHA liens when federal statutes or agency regulations are not controlling. (Citations omitted).
>
> Thus, the agencies' own operating practices belie their assertion that a federal rule of priority is needed to avoid the administrative burdens created by disparate state commercial rules. The programs already conform to each State's commercial standards. By using local lending offices and employees who are familiar with the law of their respective localities, the agencies function effectively without uniform procedures and legal rules. *Id.* at 731-2.

The *Kimbell Foods* Court summed up its position on government programs such as the FmHA's as opposed to programs which are truly "nationwide" in scope and distinguished between the essential sovereignty of the United States in collecting taxes and the rather different position of the government as lender.

> The Government therefore is in substantially the same position as private lenders, and the special status it seeks is unnecessary to safeguard the public fisc. Moreover, Congress' admonitions to extend loans judiciously supports the view that it did not in-

> tend to confer special privileges on agencies that enter the commercial field. Accordingly, we agree with the Court of Appeals . . . that '[a]s a quasi-commercial lender, [the Government] does not require the special priority which it compels as sovereign" in its tax-collecting capacity.' (Citation omitted). *Id.* at 737-8.

Subsequent to the decision in *Kimbell*, the Fifth Circuit decided *United States v. S.K.A. Associates, Inc., supra.* In discussing a question of lien priority between the Small Business Administration and a claimant of a landlord's lien, the Fifth Circuit stated as follows:

> Yet it seems to us that Justice Marshall in his very detailed opinion for a unanimous court in *Kimbell* sought to carefully instruct Government agencies that in their commercial lending activities they are subject to "customary commercial practices," (citation omitted), and should fair no better, and no worse, than a private lender. 600 F.2d at 516.

More recently, in a somewhat different context, this Court has again pointed out the distinctions between the Federal government's essential sovereign capacity and its other capacities: "But the FDIC is not the United States, ..." *O'Melveny & Myers v. FDIC*, —— U.S. ——, ——, 114 S.Ct. 2048, 2053 (1994). *O'Melveny* also reiterated the rule set forth in *Yazell* and further developed in *Kimbell Foods*: that a special federal rule will be created to displace state law only "where there is a 'significant conflict between federal policy or interest and the use of state law.' " (Citation omitted) *Id.* at 2055.

In the instant case the Court of Appeals specifically found that there was no basis for a conflict between federal and state interests as they applied to mortgage extinguishment and called for this Court to reexamine *Summerlin* in light of more recent precedent.

> Apart from the *Summerlin* principle, there is, as clearly evident in *Kimbell* and *Yazell*, no ground for

> conflict between state and federal rules of decision regarding the enforceability of government-backed mortgages.
>
> Contrary to the commercial realism prominent in all of these cases, the ancient attribute of sovereignty asserted by the federal government is far more appropriate to essential sovereign functions than to the federal government's role as lender to veterans, small business owners, farmers, and disaster victims among others. That the attribute is ancient does not make it sensibly applicable to the government's role in commercial transactions. In fact, doing away with limitations periods on a significant number of mortgage foreclosures takes a giant step backwards from the standpoint of public policy concerns for fairness and economic efficiency. Nearly every state has enacted laws to prevent the disruption of commerce in real property caused by the existence of ancient mortgages. *In short, Summerlin and related cases ought to be reconsidered insofar as they hold that state statutes of limitations may not be applied to the government's real property foreclosure actions arising from federal loan programs.* Alternatively, Congress should amend 28 U.S.C. § 2415 expressly to so provide. (Emphasis supplied). (Appendix at 8a-9a).

There is no Federal statute deciding whether or not a deed of trust and its lien on real property survives the expiration of the underlying indebtedness. In this eventuality, Federal courts will normally apply the nondiscriminatory law of the state in question as the Federal rule of decision.[7] A uniform federal rule will only be adopted in contravention of state law where the nature of the Federal program is such as to require a rule uniform in character throughout the nation. This generally occurs only where the specific objectives of the nationwide Federal program would be frustrated if a uniform

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[7] This is precisely what the Courts in *Curry* and *Thornburg* did.

national rule was not adopted. Such is demonstrably not the case here.

This same strong policy of respect for state law in fields traditionally occupied by the states, where there is no demonstrated need for national uniformity, is at the heart of federalism and is the core of the foregoing line of decisions which lead away from *Summerlin*.

Since the Fifth Circuit found there to be no reason for conflict between state and federal law concerning the enforceability of deeds of trust, such as the FmHA ones involved in this case, there is no reason why Mississippi's non-discriminatory law providing for the extinguishment of deeds of trust when there is no longer a valid underlying debt should not be adopted as the Federal rule of decision in this case.

Despite the fact that there is no reason for a conflict between federal and state policies, such a conflict actually exists, and will continue to exist, until this Court addresses the issue directly.

Justice McLean, speaking for this Court 164 years ago in *Lewis v. Marshall*, 30 U.S. 470, 477-8 (1831), put his finger squarely on the problem posed by the continued utilization of *Summerlin* in the current context.

> The best interests of society require that causes of action should not be deferred an unreasonable time. This remark is peculiarly applicable to land titles. Nothing so much retards the growth and prosperity of a country as insecurity of titles to real estate. Labor is paralyzed where the enjoyment of its fruits is uncertain; and litigation without limit produces ruinous consequences to individuals.

The extensive harm done and to be done by the holding below and the substantial criticisms cited by the Court of Appeals justify the grant of certiorari to review the judgment below.

II. THE DECISION BELOW RAISES IMPORTANT QUESTIONS CONCERNING THE APPLICATION OF STATE SUBSTANTIVE PROPERTY RIGHTS TO THE FEDERAL GOVERNMENT AND THE PROPER REACH OF FEDERAL SOVEREIGN IMMUNITY.

In its opinion below the Court of Appeals found § 15-1-21, the Mississippi statute on the extinguishment of mortgages in the absence of a valid underlying debt, to be a statute of limitations. Petitioners disagree here as they did below.

To be sure, as the Circuit found, § 15-1-21 is contained in the "Limitations of Actions" chapter of the Mississippi Code. However, the statute should be appraised according to its substance and not by the location given it by the Code compilers. The statute is the legislative enactment of the "lien theory of mortgages" [8] and establishes a substantive real property right, not a statute of limitations.

In Mississippi the law dealing with the enforceability of mortgages and deeds of trust has been clear and consistent for many years. "Where a debt is barred, the mortgage cannot be enforced." *Musser v. First National Bank of Corinth*, 147 So. 783, 784 (Miss. 1933). (See also *Gates v. Chandler*, 165 So. 442 (Miss. 1936) and *Temples v. First National Bank of Laurel*, 123 So.2d 852 (Miss. 1960)). The lien is incident to the debt and does not stand separately.

As found by Mr. Justice Holmes over 85 years ago in *Dupree v. Mansur*, 214 U.S. 161, 167 (1909) in examining a Texas statute like the Mississippi one here:

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[8] The Mississippi statute dates back to 1857. Its enactment was necessary to effectuate the "lien theory" of mortgages because the original English common law rule which we inherited was that a mortgage passed title to the property subject to redemption by payment. (See Appendix at 5a) for the Court of Appeals discussion of the lien vs. title theory of mortgages in general).

> By the law of Texas the security is incident to the note and does not warrant a foreclosure when the note does not warrant a judgment. This is not a matter of procedure or jurisdiction, but of substantive rights concerning land.

Thus, Petitioners urge that § 15-1-21 establishes a substantive right concerning property and not a statute of limitations despite its placement in the Mississippi Code. As such, it governed a portion of the rights the FmHA received when it contracted in Mississippi for a deed of trust.[9] Thus, § 15-1-21 effectively establishes a substantive precondition to the lien of the mortgage. Petitioners assert that the question is not whether state statutes of limitations are applied against the federal government, but rather what rights federal lenders knowingly contracted for and received in the first place.

Recently, another panel of the Fifth Circuit, in *Davidson, supra,* recognized that the issue posed in the instant case is not one of limitations but of property rights. In a similar setting the FDIC became the receiver of a failed bank and succeeded to the bank's position under certain deeds of trust. As part of its argument, the FDIC contended (as did FmHA in the instant case) that 28 U.S.C. § 2415(a) did not apply to mortgage foreclosures and that no state statute of limitation could therefore bar its action on the deed of trust in question. The *Davidson* Court refused to acept the FDIC's characterization of the argument, stating:

> [W]e decline to view the legal issue narrowly as one of limitations. We believe the more precise issue to

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[9] It should be noted that FmHA sought to otherwise take advantake of Mississippi law concerning the acquisition of a lien on real estate in Mississippi. E.g. FmHA recorded its deeds of trust in the Mississippi county land records and conducted power of sale foreclosures on the properties in question. Power of sale foreclosures are only available as the result of Mississippi statutory law, and therefore would have otherwise been unavailable to the FmHA.

> be whether the mortgage survives the debt, and, *in a case such as this*, that question is normally decided by state, not federal law. (Citing *Curry, supra*) (*Davidson, supra* at 250.)

As noted earlier, *Yazell* points out that government lenders are on notice of the limitations of their rights when they enter into loan contracts in the several states, and, in determining the nature of property rights created by a conveyance to the government, Federal courts look to the law of the state wherein the property is situated. *Foster v. United States*, 607 F.2d 943 (Ct.Cl. 1979). "Moreover, when the United States contracts to acquire or in fact acquires real property within a particular state, the laws of that state control what rights arise in the United States therefrom." *Id.* at 948. See also: *U.S. v. Brosnan*, 363 U.S. 237 (1960) (Extent of property and rights to which a Federal tax lien attached would be instructed by state law).

The foregoing holdings are brought into the specific focus of this case in *Curry*:

> [T]he general rule [is] that the federal common law governing contracts in which a federal agency is a party should be that of the state in which the contract was executed, assuming the state law does not unduly impact on a valid federal interest or the policies of the federal agency entering into the contracts. (Citing *Kimbell Foods, supra*, and *United States v. Crain*, 589 F.2d 996 (9th Cir. 1979)). (*Id.* at 971).[10]

The *Curry* court went on to find that whether the lien of the SBA's deed of trust survived the barring of the underlying debt would be controlled by California law. The exact same legal situation is presented in this case.

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[10] It is interesting to note that both parties to the *Curry* case, i.e. including the SBA, agreed that the status of SBA's property interest in the Curry property, the deed of trust and the power of sale "should be governed" by state law.

Statutes such as § 15-1-21 establish what amount to preconditions for the existence of a lien. They are not statutes of limitations. As the District Court stated in *Thornburg*, supra, "[A]pplying state rules regarding the extinguishment of liens does not directly implicate a state statute of limitations." *Id.* at 547. The excellent reasoning in both *Curry* and *Thornburg* support this proposition.

The decision of the Court of Appeals raises pervasive questions concerning what lien rights the quasi-commercial federal lenders obtain when they acquire contractual liens on real property. The question also remains as to whether Federal sovereign immunity concerns are even implicated by the utilization of non-discriminatory state law to determine whether federal mortgage liens are extinguished when the underlying debts are barred.

Petitioners assert that the foregoing constitute sufficient reason for granting certiorari to review the judgment of the Court of Appeals.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Fifth Circuit.

Respectfully submitted,

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